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No. 99-2022

Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT HOOD; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES H. KEATING, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court review the Ninth Circuit's fact-specific holding that Keating was "in custody" at the time he filed his habeas petition where the holding does not conflict with the decisions of other circuits or otherwise present any significant or unsettled question of law?

2. Is any important question raised by the Ninth Circuit's holding that habeas relief may be properly granted where it is undisputed that the conviction was obtained in violation of the defendant's right to have each element of the offense proven beyond a reasonable doubt?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CONSTITUTIONAL PROVISIONS INVOLVED..... 1

STATEMENT OF THE CASE..... 2

REASONS FOR DENYING THE STATE'S PETITION.. 4

I. The Ninth Circuit's Jurisdictional Analysis Does Not Present Any Issue Worthy of Review by this Court 4

A. The Ninth Circuit's Decision in this Case Does Not Conflict with Precedent from Other Circuits..... 4

B. The Ninth Circuit's Decision in this Case Will Create None of the "Sweeping Consequences" About Which the State Speculates 10

II. The Ninth Circuit's Application of *Stromberg* Was Not an Unwarranted Extension of Existing Law and Presents No Issues for Supreme Court Review..... 11

A. The Failure to Instruct the Jury on an Element of the Charged Offense Violates the Due Process Clause of the Constitution.... 13

B. *Stromberg* Does Not Require That the Petitioner Have Been Convicted of Engaging in Constitutionally Protected Conduct..... 15

C. The Ninth Circuit's Decision in this Case Was Not an Impermissible Expansion of *Stromberg* Under Either AEDPA or *Teague v. Lane*..... 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

CASES

Bachellar v. Maryland, 397 U.S. 564 (1970) 16

California v. Roy, 519 U.S. 2 (1996) 14, 15

Graham v. Johnson, 168 F.3d 762 (5th Cir. 1999) 4, 7, 8, 11

Griffin v. United States, 502 U.S. 46 (1991) 12, 16, 18, 19, 20

Guizar v. Estelle, 843 F.2d 371 (9th Cir. 1988) 6

Henry v. Lundgren, 164 F.3d 1240 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 397 (1999) 8, 10, 11

Jones v. Morton, 195 F.3d 153 (3d Cir. 1999) 4, 7, 8, 9

Lambert v. United States, 44 F.3d 296 (5th Cir. 1995) 7

Leary v. United States, 395 U.S. 6 (1969) 17, 18

Osborn v. Ohio, 495 U.S. 103 (1990) 14

Rose v. Lundy, 455 U.S. 509 (1982) 3, 6, 7, 9

Sandstrom v. Montana, 442 U.S. 510 (1979) 14, 16, 17, 18

Street v. New York, 394 U.S. 576 (1969) 16

Stromberg v. California, 283 U.S. 359 (1931) ..... *passim*

Sullivan v. Louisiana, 508 U.S. 275 (1993) 13

Teague v. Lane, 489 U.S. 288 (1989) 20

Terminiello v. Chicago, 337 U.S. 1 (1949) 16

Thomas v. Collins, 323 U.S. 516 (1945) 16

United States v. Gaudin, 515 U.S. 506 (1995) 13

TABLE OF AUTHORITIES – Continued

Page(s)

Van Tran v. Lindsay, No. 98-56251, 2000 WL 622070 (9th Cir. May 16, 2000) 10

Willams v. Taylor, ___ U.S. ___, 120 S.Ct. 1495 (2000) 21

Williams v. North Carolina, 317 U.S. 287 (1942) 17, 18

In re Winship, 397 U.S. 358 (1970) 13, 14

Yates v. United States, 354 U.S. 298 (1957)..... 18, 19, 20

Zant v. Stephens, 462 U.S. 862 (1983) 16, 18, 19, 20

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV, § 1 1

STATUTES

28 U.S.C. § 2254(d) 11

28 U.S.C. § 2254(d)(1)..... 20

California Corporations Code § 25401 2

California Corporations Code § 25540 2

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Charles H. Keating, Jr. respectfully opposes the petition for a writ of certiorari filed by Robert Hood and the Attorney General for the State of California ("the State").

CONSTITUTIONAL PROVISIONS INVOLVED[1]

Section one of the Fourteenth Amendment of the United States Constitution states:

AMENDMENT XIV

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

U.S. CONST. amend. XIV, § 1.

[1] Keating adopts the "Opinions and Order Below" and "Statement of Jurisdiction" sections set forth in the State's opening petition.

STATEMENT OF THE CASE

The salient facts relating to the State's petition are straightforward. Keating was indicted for violating California Corporations Code §§ 25401 and 25540, which prohibit material misrepresentations or omissions in connection with the offer or sale of securities. (Appendix ("App.") 82.) The jury was instructed that they could convict Keating under either one of two theories of liability: (1) a direct perpetrator theory; or (2) an aiding and abetting theory. (*Id.*) It is now undisputed that the instruction on the direct perpetrator theory did not contain an essential element of the offense – *mens rea*. (State Petition ("Pet.") at 7; App. 86-87.) The jury did not specify under which theory it convicted Keating. (App. 87.)

After the California Supreme Court dismissed his appeal, Keating timely filed a petition for a writ of habeas corpus in federal district court. The district court granted Keating's petition, holding that the direct perpetrator instruction violated Keating's right to due process because it omitted an essential element of the offense. The district court also held that the aiding and abetting instruction violated Keating's due process rights. (App. 15.) The State appealed.

On January 15, 1998, the Ninth Circuit filed an opinion dismissing the appeal on the ground that Keating failed to exhaust his claim that the aiding and abetting instruction violated his due process rights. (App. 5-6.) Keating immediately removed the unexhausted ground and refiled his habeas petition in district court on January 22, 1998. The district court granted the petition after, once again, concluding that the direct perpetrator instruction

violated Keating's due process rights. (*Id.*) The State appealed.

In an opinion filed on September 16, 1999, the Ninth Circuit affirmed the district court's order, agreeing that the omission of an essential element from the direct perpetrator instruction violated Keating's constitutional right to due process and concluding that the jury's general verdict must be set aside. (App. 54-55.) In response to the State's assertion that the district court lacked jurisdiction because Keating was not "in custody" when his January 22 petition was filed, the majority held that, consistent with *Rose v. Lundy*, 455 U.S. 509 (1982), the petition should be treated as an amendment of his initial petition because Keating elected to delete the unexhausted ground and proceed with the petition, rather than return to state court to exhaust his claim. (App. 51-52.) The majority and dissenting opinions were amended on October 19, 1999. (App. 74.)

The Ninth Circuit subsequently denied the State's request for rehearing *en banc*. (App. 116-17.) Not a single judge requested a vote on whether to rehear the matter *en banc*. (App. 116).

REASONS FOR DENYING THE STATE'S PETITION

I. The Ninth Circuit's Jurisdictional Analysis Does Not Present Any Issue Worthy of Review by this Court.

A. The Ninth Circuit's Decision in this Case Does Not Conflict with Precedent from Other Circuits.

The State struggles mightily in an attempt to establish that the Ninth Circuit's decision in this case conflicts with precedent from other circuits. That effort is fruitless. Neither of the cases relied upon by the State – *Jones v. Morton*, 195 F.3d 153 (3d Cir. 1999), and *Graham v. Johnson*, 168 F.3d 762 (5th Cir. 1999) – involved a petitioner like Keating, who, after an appellate court dismissed his mixed habeas petition without prejudice but before the mandate issued, promptly refiled an identical petition omitting the unexhausted claim. Nor did either case address the issue that the Ninth Circuit was called upon to decide here: whether the petitioner was "in custody" within the meaning of the habeas statute.

In its attempt to manufacture an intercircuit dispute, the State gives the Ninth Circuit's opinion a far broader reading than the opinion will bear, proclaiming that:

> The Ninth Circuit has created a new rule for habeas corpus cases – i.e., when an original petition is dismissed without prejudice for lack of exhaustion and a subsequent petition is filed, the law which governs the subsequent petition is the law which was in effect when the original petition was filed.

(Pet. at 11.)

The Ninth Circuit created no such rule. The Ninth Circuit simply concluded that, under the unique circumstances of this case, it would treat Keating's January 22 petition as an amended petition for the purposes of determining whether Keating was "in custody" within the meaning of the habeas statute and determining what law applies.

The unique circumstances of this case bear repeating. Keating filed a habeas petition in federal district court urging, among other things, that his due process rights had been violated because the jury instructions omitted an element of the offense. The district court agreed and granted the petition. The Ninth Circuit, however, concluded that Keating's petition contained an unexhausted claim and should be dismissed without prejudice. One week after the opinion issued and before the Ninth Circuit's mandate even issued, Keating promptly filed a habeas petition in the district court that was identical to his previous petition except that it omitted his unexhausted claim.

The State argued before the district court that Keating was not "in custody" when his exhausted petition was filed because he had been freed when his initial petition was granted, and the Ninth Circuit's mandate had not yet issued. Consequently, the State argued that the district court lacked jurisdiction to grant his petition. The district court disagreed and granted Keating's petition.

On appeal, the State reurged its jurisdictional argument that Keating was not in custody when he filed his exhausted petition. In a footnote, however, the State

encouraged the Ninth Circuit to reach the merits or "provide the district court with guidance," acknowledging that Keating would simply refile his petition if the district court were reversed on jurisdictional grounds. (Appellants' 4/28/98 Brief at 24 n.8.)

The Ninth Circuit concluded that Keating was in custody because, under the unique circumstances presented, his fully exhausted petition should be treated as an amendment of his initial petition. The Ninth Circuit relied in part on *Rose v. Lundy*, in which this Court stated that a petitioner whose mixed habeas petition is dismissed for failure to exhaust has "the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court[,]" 455 U.S. at 510, and later Ninth Circuit decisions that interpreted *Rose v. Lundy* as providing a petitioner with the option of amending his mixed petition to delete unexhausted claims or returning to state court to exhaust his unexhausted claims. *See, e.g., Guizar v. Estelle*, 843 F.2d 371, 372 (9th Cir. 1988) (holding that a petitioner's resubmitted exhausted petition could be accepted by the district court *nunc pro tunc*). The Ninth Circuit concluded that Keating's exhausted petition, which was filed before the Ninth Circuit's mandate issued, "would more properly be regarded as an amended petition deleting the unexhausted claim." (App. at 90.)[2]

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[2] The dissent agreed that the district court had jurisdiction to grant the petition on the theory that Keating's "habeas petition should be treated as prematurely filed and that it became 'ripe' when our mandate issued." (App. at 92 n.10.) The

Unlike *Keating*, neither *Graham* nor *Jones* involved whether a petitioner was "in custody" when his petition was filed.[3] Indeed, the facts of *Graham* and *Jones* bear no resemblance to those of this case. In *Graham*, eighteen months after the district court dismissed Graham's third federal habeas petition for failure to exhaust state-court remedies, Graham returned to state court and filed a third state habeas petition. 168 F.3d at 771-72. The Texas state court dismissed his third state habeas petition as an abuse of the writ. *See id.* at 772. Graham then returned to federal court more than two years after his third federal habeas petition was filed and filed yet a fourth federal habeas petition. *Id.* The district court concluded that the Antiterrorism and Effective Death Penalty Act ("AEDPA") applied to Graham's fourth habeas petition, which he filed after AEDPA's effective date. The district court further concluded that Graham's fourth habeas petition was a second or "successive" habeas petition within the meaning of AEDPA and dismissed his fourth petition because he had not obtained the court of appeals' permission to file a successive habeas petition. *Id.*

On appeal, Graham argued that AEDPA should not apply to his fourth federal habeas petition because his

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majority adopted the dissent's rationale as an alternative holding. *Id.*

[3] The State also cites a hodgepodge of cases outside the habeas context and half-heartedly asserts that these decisions conflict with the Ninth Circuit's decision. (Pet. at 7, 13 (citing, *e.g.*, *Lambert v. United States*, 44 F.3d 296 (5th Cir. 1995))). None of these non-habeas cases involved the unique circumstances presented here. Moreover, *Rose v. Lundy* did not serve as a backdrop to any of these decisions.

fourth petition was merely a continuation of his previously dismissed third petition, which he theorized had been held "in abeyance" while he exhausted his claims. *Id.* at 775-81. The Fifth Circuit rejected that argument, concluding, as the Ninth Circuit and other circuits have, that a second petition filed after a petitioner returns to state court and exhausts his state-law claims does not relate back to the date the mixed petition was filed. *See id.; see also, e.g., Henry v. Lundgren*, 164 F.3d 1240, 1241 (9th Cir. 1999) (post-exhaustion petition does not relate back for purposes of determining whether petitioner is in custody), *cert. denied*, 120 S. Ct. 397 (1999). Unlike Keating, Graham opted to return to state court to exhaust his remedies there rather than promptly amending his petition to delete his unexhausted claims. Thus, the Ninth Circuit's decision in this case is entirely consistent with the Fifth Circuit's decision in *Graham*.

Nor does the Ninth Circuit's decision in this case conflict with *Jones v. Morton*. In *Jones*, the petitioner filed three federal habeas petitions, the first two of which were dismissed for failure to exhaust state-court remedies. 195 F.3d at 155-56. Nearly a year and four months after the district court dismissed Jones's second petition on exhaustion grounds (and nearly ten months after the Third Circuit denied his application for a certificate of appealability), Jones again filed a federal habeas petition, which reasserted the same three unexhausted claims contained in his second petition. *See id.* at 156.

The district court dismissed Jones's third petition on the ground, among others, that it was barred by AEDPA's one-year statute of limitations. *Id.* The Third Circuit affirmed, rejecting the petitioner's argument that the

third petition should be deemed to relate back to the filing of the first or second petition. *Id.* at 160-61. The Third Circuit emphasized that his petitions had been dismissed "and the cases closed." *Id.* at 160. Unlike Keating, the petitioner in *Jones* neither acted promptly, nor presented the district court with a petition containing only the exhausted claims. Thus, it was not conceivable that the district court or the Third Circuit could have treated Jones's third petition as an attempt to present an amended petition deleting his unexhausted claims under *Rose v. Lundy*.

The decision at issue here announced no grand principles, but instead merely held that under the unique circumstances of this case, Keating's petition deleting his unexhausted claims would be treated as an amended petition. There is no dispute that a petitioner may properly be allowed to amend his petition to delete unexhausted claims under *Rose v. Lundy*. Nor is there any dispute that an amended petition relates back to the date the petition was first filed. The only dispute is whether it was proper for the Ninth Circuit, under the narrow circumstances presented here, to deem Keating's petition an amended petition. This is not a matter as to which there is any conflict between circuits, nor is it an important legal issue meriting this Court's review.[4]

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[4] Further, as discussed below, because the Ninth Circuit's decision involved the application of well-established Supreme Court precedent, the result is the same whether pre- or post-AEDPA law is applied. *See infra* Part II.

B. The Ninth Circuit's Decision in this Case Will Create None of the "Sweeping Consequences" About Which the State Speculates.

The State's argument that the Ninth Circuit's decision will have sweeping consequences is premised on the same artificially broad misreading of the opinion that the State advances in a failed effort to establish an intercircuit conflict. In short, the State fails to distinguish between a petitioner who returns to state court after his mixed petition is dismissed and a petitioner who proceeds in federal court on only his exhausted claims. Failing to make this distinction, the State posits that:

> To avoid the applicability of the one-year limitation period, the Ninth Circuit's decision encourages a state prisoner to simply file an unexhausted federal petition prior to the expiration of the one-year term. After the petition is dismissed, he could then take an indefinite amount of time to exhaust his claims and return to federal court with a fully exhausted petition.

(Pet. at 16.)

The Ninth Circuit's decision in this case excludes that possibility, however, by expressly distinguishing the situation in which a petitioner whose mixed petition is dismissed returns to state court to exhaust his claims and then returns with a second petition. (*See* App. at 92 n.9 (distinguishing *Henry v. Lundgren*, 164 F.3d 1240 (9th Cir. 1991), which held that a second petition filed post-exhaustion is treated as a new petition for purposes of custody analysis)); *accord Van Tran v. Lindsay*, No. 98-56251, 2000 WL 622070 (9th Cir. May 16, 2000). In those cases, the Ninth Circuit and other circuit courts

have squarely held that a petition filed in federal court after the petitioner has exhausted his state-law claims does not relate back to the date of the first petition. *See, e.g., Henry*, 164 F.3d at 1241; *Graham*, 168 F.3d at 775-81.[5] Nothing in the *Keating* decision disturbs these decisions. Thus, contrary to the State's suggestion, a state prisoner would obtain no benefit by taking an indefinite amount of time to exhaust his claims in state court.

To the extent that the State argues that a petitioner could file a mixed petition and then wait for an indefinite period after the court dismissed the mixed petition to file a petition omitting the unexhausted claims (*see* Pet. at 7), nothing suggests that Ninth Circuit or any other court would treat the exhausted petition as an amended petition under those circumstances. The Ninth Circuit's holding here is simply a fact-specific resolution of the narrow question of whether Keating was in custody for purposes of habeas law.

II. The Ninth Circuit's Application of *Stromberg* Was Not an Unwarranted Extension of Existing Law and Presents No Issues for Supreme Court Review.

The State next asserts that the Ninth Circuit's opinion "extrapolated on a rule" set forth in this Court's decision in *Stromberg v. California*, 283 U.S. 359 (1931), and

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[5] Moreover, to the extent that any such delay occurs while a petitioner's state post-conviction proceedings are pending, that time does not count against AEDPA's one-year statute of limitations by AEDPA's own terms. *See* 28 U.S.C. § 2254(d).

"extended it well beyond permissible bounds." This argument is, once again, a futile attempt to stir up controversy where none exists. In claiming that the Ninth Circuit's opinion "extended" existing law, the State makes two unfounded arguments: (1) the direct perpetrator instruction did not violate any "constitutionally based" rule (Pet. at 9); and (2) even if it did, *Stromberg* does not reach cases in which "the erroneous theory . . . does not punish constitutionally protected conduct." (Pet. at 21). Both arguments are without merit.

It is well settled that omission of an element of an offense from a jury instruction is an error of constitutional magnitude. It is equally well settled that *Stromberg* is not limited to cases in which the defendant may have been convicted for engaging in constitutionally protected conduct. Indeed, this Court has repeatedly applied *Stromberg* to "general-verdict convictions that may have rested on an *unconstitutional ground*." *Griffin v. United States*, 502 U.S. 46, 55 (1991) (emphasis added) (citing cases). Thus, the Ninth Circuit's decision falls squarely within the parameters of settled constitutional law, and habeas relief was proper regardless of whether pre- or post-AEDPA law governs this petition.[6]

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[6] As such, the jurisdictional argument advanced by the State does not ultimately influence the outcome of this case.

A. The Failure to Instruct the Jury on an Element of the Charged Offense Violates the Due Process Clause of the Constitution.

As an initial matter, the State suggests throughout its petition that habeas relief was inappropriate in this case because the omission of the *mens rea* element from the direct perpetrator instruction was merely a violation of a "judicially created" rule or was merely "legally erroneous" rather than an error of constitutional magnitude. (*See, e.g.*, Petition at 7, 9, 21.) The State's suggestion is wholly unfounded.

It has long been settled that a criminal defendant has a constitutional right to require proof beyond a reasonable doubt as to each element of the charged crime:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship, 397 U.S. 358, 364 (1970).

Since *Winship*, this Court has repeatedly held that failure to instruct the jury on an essential element of the charged offense violates the Due Process Clause. *See, e.g., United States v. Gaudin*, 515 U.S. 506, 510 (1995) ("We have held that [the Fifth and Sixth Amendments] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (holding that

the Due Process Clause requires proof "beyond a reasonable doubt" of the facts necessary to establish each element of the offense); *Osborn v. Ohio*, 495 U.S. 103, 122-24 & n.17 (1990) (holding that omission of an element of the charged offense from the jury instructions violates the Due Process Clause); *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979) (holding that a presumption relieving the State of its obligation to prove the *mens rea* element violated the Due Process Clause).

Here, it is undisputed that the jury was instructed that it could convict Keating of a serious felony without any finding of *mens rea*. It is also undisputed that *mens rea* was an essential element of the charged offense. (Pet. at 7.) As such, the direct perpetrator theory unquestionably violated Keating's constitutional right to have the State prove each element of the charged offense beyond a reasonable doubt. *See, e.g., Sandstrom*, 442 U.S. at 521; *Winship*, 397 U.S. at 364. In fact, the State *never even challenged* the district court's finding that the omission of the *mens rea* from the direct perpetrator instruction violated Keating's constitutional right to due process.

Likewise, as expressly noted in the Ninth Circuit's majority opinion, the State *never contended* that sufficient evidence of Keating's *mens rea* had been presented so as to render such an error harmless. *See, e.g., California v. Roy*, 519 U.S. 2 (1996). Although the majority and dissent disagreed as to the *Roy* issue – the majority expressly holding that the State has conceded the harmfulness of the error and the dissent reaching the issue without discussing the waiver defect – the State has not petitioned this Court for review of either the Ninth Circuit's finding of waiver, or its alternative determination that the error

was not harmless under the *Roy* standard. Because these issues are not before the Court, they will not be addressed further.

In sum, the error committed in this case deprived Keating of his right to have the prosecution prove each element of the charged offense beyond a reasonable doubt. This is not a "judicially created" right or a creature of state law. Instead, this right has long been recognized by this Court as a fundamental right arising from the Due Process Clause of the Constitution.

B. *Stromberg* Does Not Require That the Petitioner Have Been Convicted of Engaging in Constitutionally Protected Conduct.

Recognizing the futility of its argument that omission of an element is not an error of constitutional dimension, the State next argues that the Ninth Circuit impermissibly extended the rule of *Stromberg* to the facts of this case because "the erroneous direct perpetrator instruction . . . did not punish constitutionally protected conduct." (Pet. at 9.) Although this argument is neither clearly nor consistently articulated, the State appears to suggest that this Court has limited *Stromberg* to cases in which the petitioner may have been convicted of engaging in constitutionally protected conduct.[7] The State's reading of

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[7] The State is far from consistent on this point, at times stating that "the *Stromberg* rule was one which was based on the Constitution and required a conviction to be set aside if a possible basis of the conviction violated the Constitution." (Pet. at 8.) The State's inconsistency on this point is not surprising,

Stromberg, however, is directly contradicted by established Supreme Court precedent.

As this Court has explained,

> [o]ne rule derived from the *Stromberg* case is that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.

Zant v. Stephens, 462 U.S. 862, 881 (1983).

In the nearly seventy years following *Stromberg*, this Court has consistently applied its reasoning in *Stromberg* to "general-verdict convictions that may have rested on an *unconstitutional ground*." *Griffin*, 502 U.S. at 55 (emphasis added) (citing cases). While some cases applying *Stromberg* have involved convictions that may have rested on constitutionally protected conduct,[8] others clearly have not. It is beyond dispute that this Court also has applied *Stromberg* in cases involving defendants who may have been convicted in violation of another constitutional provision, such as the Full Faith and Credit Clause, the Fifth Amendment privilege against self-incrimination, and, most importantly for purposes of this case, the Due Process Clause. *See, e.g., Sandstrom v. Montana*, 442 U.S.

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however, in light of the unbroken line of cases applying the rule to cases in which the defendant may have been convicted in violation of the Constitution, and not simply for engaging in constitutionally protected conduct.

[8] *See, e.g., Bachellar v. Maryland*, 397 U.S. 564 (1970); *Street v. New York*, 394 U.S. 576 (1969); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Thomas v. Collins*, 323 U.S. 516 (1945).

510 (1979) (Due Process Clause); *Leary v. United States*, 395 U.S. 6 (1969) (Fifth Amendment privilege against self-incrimination); *Williams v. North Carolina*, 317 U.S. 287 (1942) (Full Faith and Credit Clause).

This Court's decision in *Sandstrom* is particularly illustrative. In *Sandstrom*, the jury received an instruction that arguably shifted the burden of proof regarding *mens rea* to the defendant. The Court held that this instruction was unconstitutional in violation of the Fourteenth Amendment's Due Process Clause. *Sandstrom*, 442 U.S. at 524. The State argued that the conviction could stand because the jury may have disregarded the presumption language and instead convicted Sandstrom under different language in the instructions that required the state to prove "knowledge." In rejecting this argument, this Court stated:

> But, more significantly, even if a jury *could* have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do. As the jury's verdict was a general one, [ ] we have no way of knowing that Sandstrom was not convicted on the basis of the unconstitutional instruction.

Id. at 526 (emphasis in original).[9] The opinion then quotes *Stromberg* for the proposition that a general verdict cannot

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[9] The facts of the present case are even more egregious than in *Sandstrom*. Here, rather than arguably shifting the burden of proof as to the "critical question" of *mens rea*, the jury instruction eliminated the requirement altogether. In fact, the State has not disputed that, if the direct perpetrator instruction had been the only instruction given to the jury, Keating would have been entitled to habeas relief. (App. 94-95.) Again, the

stand where it may have rested on an unconstitutional theory of liability. *Id.* Thus, *Sandstrom* squarely applies *Stromberg* to a jury instruction that violated the defendant's due process rights.

Tellingly, the State never even mentions *Sandstrom* or any of the other cases (*e.g.*, *Leary* and *Williams*) applying *Stromberg* to general-verdict convictions that may have rested on an unconstitutional ground. Instead, the State relies on two passages, taken completely out of context, from *Zant v. Stephens*, 462 U.S. 862 (1983), and *Griffin v. United States*, 502 U.S. 46 (1991), to essentially argue, without mentioning the numerous precedents to the contrary, that this Court has confined *Stromberg* to its facts. Such a result is untenable under any reading of *Zant* or *Griffin*.

First, the State's argument divorces these passages from the factual background and issues involved in those cases. At issue in *Zant* was whether the defendant's death sentence could stand where one of three aggravating circumstances was found to be unconstitutional, although the two other grounds, each of which was expressly found by the jury, were upheld. 462 U.S. at 864. In *Griffin*, the issue was whether *Stromberg* required that "a general verdict be set aside because one of the possible bases of conviction was neither unconstitutional as in *Stromberg*, nor even illegal as in *Yates* [*v. United States*, 354 U.S. 298 (1957),] but merely unsupported by sufficient evidence." 502 U.S. at 56.

State neither contends that *mens rea* is not a required element of the offense nor that the evidence of Keating's *mens rea* was sufficiently uncontested so as to render this error harmless.

Second, the State ignores specific language in both *Zant* and *Griffin* that reaffirmed that *Stromberg* is properly applied where a constitutional violation has occurred. For example, the State fails to acknowledge that the Court in *Zant* unambiguously stated that:

> One rule derived from the *Stromberg* case is that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of the grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.

462 U.S. at 881. The language quoted by the State (*see* Pet. at 19-20) deals with a *different* rule arising from *Stromberg* and does not call into question the rule of *Stromberg* at issue here, which, as noted above, has been consistently applied to general-verdict convictions that may have rested on an unconstitutional ground.

Likewise, the State's argument would require the Court to ignore specific language in *Griffin* that the continued vitality of *Yates* – a case that extended *Stromberg* to a general-verdict conviction in which one of the possible bases of conviction did not invoke any specific constitutional provision – was not at issue. *See* 502 U.S. at 56 ("Our continued adherence to the holding of *Yates* is not at issue in this case. What petitioner seeks is an extension of its holding – an expansion of its expansion of *Stromberg* – to a context in which we have never applied it before.").[10]

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[10] The State's misreading of *Griffin* is further underscored by its passing suggestion that the *Griffin* Court's discussion of

In sum, the Ninth Circuit's decision was wholly consistent with nearly seventy years of this Court's precedent. Faced with this well-established precedent, the State simply seizes on out-of-context quotations from *Zant* and *Griffin* in an attempt to create issues where none exist. This Court should see through this transparent attempt and deny the State's petition.

C. The Ninth Circuit's Decision in this Case Was Not an Impermissible Expansion of *Stromberg* Under Either AEDPA or *Teague v. Lane*.

Given this conclusion, it necessarily follows that the Ninth Circuit's decision in *Keating* was not an unwarranted extension of existing law under either AEDPA or *Teague v. Lane*. Under AEDPA, habeas relief is appropriate if the state court decision is "contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Under *Teague v. Lane*, habeas relief is appropriate unless the case would involve the application of a "new rule." 489 U.S. 288 (1989).

Yates indicated that the Due Process Clause is "an unlikely basis" for *Stromberg*-type error. (Pet. at 20.) *Griffin* made no such statement. Instead, the Court simply noted that it was unlikely that the underlying error in *Yates* – a statutory time bar – was grounded in the Due Process Clause. *Griffin*, 502 U.S. at 55-56. Here, of course, there is no such issue as it is beyond dispute that the underlying error – the omission of the *mens rea* element from the direct perpetrator instruction – is firmly grounded in the Due Process Clause. *See supra* Part II.A.

Here, Keating's conviction violated clearly established Federal Law – both *Stromberg* and the Fourteenth Amendment's due process guarantee that guilt be proven beyond a reasonable doubt. Thus, whatever the phrase "clearly established Federal Law, as determined by the Supreme Court of the United States" means, the facts of this case do not test it.

Moreover, to the extent that the State argues that AEDPA requires an identical precedent with identical facts, it is beyond dispute, as the Ninth Circuit properly held, that AEDPA imposes no such requirement. (App. 94, n.11) Such a reading would not only eviscerate the force of this Court's precedents, but it conflicts with the reasoning set forth in this Court's recent case of *Willams v. Taylor*, ___ U.S. ___, 120 S.Ct. 1495, 1523 (2000) (noting that a habeas writ is appropriate if state court decided *"question of law"* in contrary manner, or if state decides a case differently on a set of *materially* indistinguishable facts (emphasis added)).

In sum, the Ninth Circuit's application of *Stromberg* and its progeny to the facts of this case was not an extension, much less an unwarranted extension, of existing law. To the contrary, the Ninth Circuit applied well-settled rules of constitutional law that have been announced by this Court through the years. It is the State, not the Ninth Circuit, that seeks to alter these rules. This Court should decline the State's request and deny the petition.

CONCLUSION

Contrary to the State's assertions, the Ninth Circuit's opinion in *Keating v. Hood* neither conflicts with the law of other circuits, nor the precedential opinions of this Court. Accordingly, Keating respectfully requests this Court to deny the State's Petition in its entirety.

Respectfully submitted,

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